OCT 15 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-422

JOHN E. DUNBAR III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Fourth District, West Palm Beach, Fla.

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MIAMI REVIEW — 371-4853 — 377-3721

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Supreme Court
of the
United States

OCTOBER TERM, 1974

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JOHN E. DUNBAR III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Fourth District, West Palm Beach, Fla.

PETITION FOR A WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, JOHN E. DUNBAR III, through his attorneys, Stone and Schapiro, prays that a Writ of Certiorari be

issued to review the judgment of the Supreme Court of the State of Florida, entered on June 4, 1974, and rehearing denied on July 16, 1974, thereby affirming the judgment of the Fourth District Court of Appeals of the State of Florida, which affirmed the judgment of the Circuit Court of Broward County, Florida, placing the petitioner on probation for a period of six (6) years, with the first year to be spent in the Broward County Jail. Said Order was entered on April 6, 1973.

JUDGMENT AND OPINION OF THE COURT BELOW

The Order of the Supreme Court of Florida, on June 4, 1974, and July 16, 1974, is set out in Appendix A & B attached to this Petition. The Order of the District Court of Appeal for the Fourth District of Florida is set out in Appendix C attached to this Petition. The judgment of the Broward County Circuit Court dated April 6, 1973, is set out in Appendix D attached to this Petition.

JURISDICTION OF THIS COURT

1. The date of judgment to be reviewed was entered by the Supreme Court of Florida on July 16, 1974. This Petition is filed within the ninety days of said Order.

2. The jurisdiction of this court is invoked under Title 28 U.S. Code, Sec. 1257 (3) and Rule 19 (1) of the Rules of this Court.

QUESTION PRESENTED FOR REVIEW

Were the Petitioner's Constitutional rights guaranteed to him under the Fourth Amendment to the United States

Constitution, as made applicable to the State of Florida by the Fourteenth Amendment to the United States Constitution, when the trial court refused to grant the Petitioner's motion to suppress evidence seized from a vehicle in which he was a passenger.

CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment to the United States Constitution, and the Fourteenth Amendment to the United States Constitution. The pertinent provisions are set out in Appendix E of this Petition.

STATEMENT OF CASE

On August 10, 1972, Petitioner and one Laurie Squire were charged with possessing more than five grams of marijuana, occurring on August 7, 1972. In addition to this charge, your petitioner was charged with the misdemeanor of "intoxication". On September 26, 1972, a motion to suppress was filed. In addition, your petitioner filed a motion seeking the disclosure of identity of the confidential informant. On January 26, 1973, the Court denied the motion to suppress, and refused to require the State to reveal the identity of the confidential informant. On February 1, 1973, Petitioner changed his plea from Not Guilty to Nolo contendere, but reserved his right to appeal the Court's denial of his motion to suppress. On April 6, 1973, Petitioner was sentenced to six (6) years probation, with the first year to be served in the Broward County Jail.

The first witness called by the State on January 26, 1973, at the motion to suppress evidence hearing was Agent

William D. Buchanan of the Bureau of Customs. Agent Buchanan stated that at 7:00 or 7:30 P.M. on August 7, 1972, he met officers of the Pembroke Park Police Department, at Denny's Restaurant, near the Holiday Trailer Park, in Pembroke Park, Florida (Tr. 11-14). Agent Buchanan advised the officers that he had information that a large quantity of marijuana would be delivered inside the trailer park that night, in some motor homes (Tr. 14). Agent Buchanan stated that he was advised by a confidential informant that three of these motor homes, one of which was an "Explorer", would go out of the park one at a time. When they returned, they would each contain a large quantity of marijuana to be delivered to a group of people who were staying in these motor homes at that trailer park (Tr. 15). Agent Buchanan stated that he had received information in the past from the informant which had proven reliable, and that he had been in contact with him for approximately five years (Tr. 17-18). The Agent stated that he first received information about the shipment of marijuana to the trailer park in early July, but did not recall the exact date (Tr. 18). The last report the Agent had with the informant was on August 7, 1972, in the afternoon. In this report the Agent was told that the shipment was in, and would be delivered that night (Tr. 19).

Shortly after the meeting at Denny's Restaurant, the Pembroke Park officers with Agent Buchanan took up surveillance outside the Trailer Park (Tr. 21). At 8:30 or 9:00 P.M., the first camper left, and returned some thirty or forty minutes later (Tr. 22). During this time, the witness was behind a gas station, and was in radio communications with Agents Mason and Burton, who were inside the trailer park in a Volkswagen Camper (Tr. 23).

The agents in the park advised Agent Buchanan that packages were taken out of the motor homes and placed in the trunk of two vehicles (Tr. 34). The witness forgot the description of the vehicles, but believes that one was a Ford (Tr. 34). The witness believed that the other vehicle was a Dodge, but his memory was "hazy" (Tr. 35). Agent Buchanan advised Lieutenants LoBiando and Lees that he had been advised that the bags had been placed in the vehicles (Tr. 36). The witness was informed that a woman was driving one of the vehicles, and that the vehicle had a male occupant (Tr. 37). One of the vehicles went to Miami Beach, and the other was stopped by Lieutenant Lees on I-95 (Tr. 37). The activity described to the witness by the agents in the Volkswagen was that people were going in and coming from various campers, and that they were moving gunnysacks into the trunks of the vehicles (Tr. 38). Lt. Lees saw one of the vehicles leave the park and stopped it.

On cross examination, the witness stated that Lieutenant Lees stopped the Ford on I-95, and that the Dodge that went to Miami Beach was also stopped and marijuana seized (Tr. 42). When the witness was asked how many arrests were made as a result of information given to him by the confidential informant, the witness said he did not know. He then stated that it would be more than ten but less than fifty (Tr. 43). The informant has never testified in court for Agent Buchanan. The witness was not positive whether or not the informant had ever been arrested. (Tr. 44). When asked how the informant got his information on this case, Agent Buchanan stated that he wasn't in a position to know. When defense counsel attempted to pursue this line of questioning of how the informant obtained his knowledge in this case, the prosecu-

tor objected, and the court sustained the objection (Tr. 46). At the night in question, there were between 50-75 trailers in the trailer park. Agent Mason stated that his confidential informant did not tell him that John Dunbar was going to be a passenger in a car, and that the trunk would contain marijuana (Tr. 51).

Lieutenant Lees testified that he was on surveillance with Agent Buchanan behind the gas station, starting at about 7:30 P.M. (Tr. 60-61). Lt. Lees stated that he received a radio message that bags of marijuana were being loaded into a Dodge Polara that was getting ready to leave the trailer park. The time of this communication was approximately 3:15 or 3:30 in the morning (Tr. 61-62). Lt. Lees was advised to stop the vehicle by Lt. LoBiando, who was in charge (Tr. 62). The witness observed the Dodge make a turn. It was approximately 3:00 in the morning, and no other vehicles were on the highway at the time (Tr. 65). Lt. Lees then stated that he observed the Dodge make a left hand turn from the center lane of Hallandale Beach Blvd. (Tr. 66). Lt. Lees hit the siren and put on the blue light, and the vehicle stopped (Tr. 66). The driver was a female named Laurie Squire, and the petitioner was a passenger (Tr. 67). The driver showed Lt. Lees her Driver's License, and in the witness' opinion "was under the influence of something." (Tr. 70). Lt. Lees did not detect an odor of alcohol, and concluded that she had been doing something (Tr. 71). The driver was placed under arrest for making an improper left turn, and driving while under the influence of intoxicating liquor or narcotic drug, (Tr. 71). Lt. Lees then asked the passenger to step out, and the passenger showed him a rental agreement bearing his name (Tr. 72). Lt. Lees claimed that the petitioner was bare-chested, and had on no shirt. The shirt was

draped over the front seat. The witness stated that he detected a strong odor of marijuana coming from the shirt (Tr. 73). At this time Lt. Lees placed the petitioner under arrest for drunkenness, because he looked like he hadn't slept in five days, and shouldn't have been in public (Tr. 73). Lt. Lees handcuffed the petitioner and the driver, and put them in the police car (Tr. 73). After the petitioner was placed under arrest, Lt. Lees searched him and found $1,600.00. Lt. Lees then opened the trunk of the vehicle with a key found in Miss Squire's purse, and found marijuana (Tr. 74). The marijuana was contained in burlap bags, which in turn were wrapped in green garbage bags. There were 40 bags weighing 40 lbs. apiece (Tr. 74). A blue suitcase was also found in the trunk. The witness opened the suitcase and also found a quantity of marijuana (Tr. 75). Lt. Lees also took the shirt in the front seat which smelled from marijuana.

On cross examination, Lt. Lees stated that at the time he conducted the search of the Dodge, that both the petitioner and the driver were handcuffed in his police car. A Hallandale police officer was standing guard over the pair, and the witness did not feel that he was in any danger (Tr. 78). Lt. Lees admitted that he really wasn't inventorying the car, that he was looking for grass (Tr. 78). Lt. Lees then called the wrecker, and had Sgt. Barbieri go with the wrecker driver to the police station. The officer admitted that he would have searched the car no matter what the occupants would have done. The inventory had nothing to do with it; the witness stated that he was out to search the car (Tr. 80). Lt. Lees further admitted that he had made a statement at a Discovery deposition taken December 21, 1972, that if the driver hadn't made any improper traffic violation, that he would have stopped the

car anyway (Tr. 81). Lt. Lees further admitted that he was intending to stop the vehicle before the traffic violation (Tr. 83). Lt. Lees said that he was told to stop the vehicle (Tr. 84). The witness stated that he heard over Agent Buchanan's radio, from agents secreted in the bushes, that the marijuana was being loaded with grass. It was Lt. Barbieri that instructed Lt. Lees to stop the Dodge (Tr. 85). The witness stated that he had no personal knowledge as to what was transpiring, and had no reason to stop the car, other than what he was told (Tr. 86). Lt. Lees reiterated the fact that the petitioner was not wearing a shirt that night (Tr. 91).

The Petitioner, JOHN DUNBAR, testified that at the night in question, that he was not intoxicated (Tr. 96). He further stated that he was wearing a shirt on that evening (Tr. 97). Petitioner stated that as soon as the officer turned on his light and siren, that the driver of his car pulled over to the side (Tr. 98). The driver had a license, and he had the registration for the car (Tr. 98). The petitioner further stated that the arresting officer told him to empty his pockets, and at this time another police car pulled up (Tr. 99).

The last witness on the motion to suppress was Officer Jack Barbieri. The witness stated at the night of the arrest, that the petitioner was wearing a flowered shirt (Tr. 108). The witness believed that the stop was made at about 4:00 in the morning. On cross examination, the witness stated that he was certain that the petitioner had on a shirt (Tr. 112 and 114). The driver of the vehicle was placed under arrest at the time for driving under the influence and improper left turn, and the petitioner was placed under arrest for drunkenness (Tr. 112). Officer

Barbieri stated that Lt. Lees made an "inventory" of the vehicle's contents, after the vehicle's occupants were arrested (Tr. 113) and placed in the police car (Tr. 114). The agents who allegedly observed the marijuana being loaded into petitioner's vehicle did not testify, and no reason was given for their failure to testify.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I

PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS, AS INTERPRETED BY THIS HONORABLE COURT, WERE VIOLATED BECAUSE THE SEARCH AND SEIZURE OF EVIDENCE FROM THE PETITIONER'S VEHICLE WAS NOT BASED ON SUFFICIENT PROBABLE CAUSE, AND WAS MADE WITHOUT THE BENEFIT OF A VALID SEARCH WARRANT.

The questions posed by your petitioner was (1) Did Lt. Lees have sufficient probable cause to stop the petitioner's vehicle; and (2) was the warrant requirement of the Fourth Amendment violated, by the search of the trunk of your petitioner's vehicle without a magistrate first determining by an affidavit under oath that probable cause existed to search the vehicle.

An integral part of the first question is whether or not the identity of the informant should have been disclosed to the petitioner, as per his motion. In *McCray v. Illinois*,

386 U.S. 300, 18 L.Ed. 62, 87 S.Ct. 1056 (1967), this Court refused to require the identity of an informant to be disclosed where the informant stated that the petitioner was selling narcotics, and had narcotics on his person, and could be found in a certain location at a certain time. The arresting officers had observed the petitioner, and had the informer point out the petitioner to them. The officers testified in great detail as to the informant's past reliability, in that he had the names of the people who were convicted as a result of the informant's testimony. The Court in McCray, supra, distinguished the fact situation in *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 142, which more closely resembles the facts of the case sub judice, and found that the testimony of each of the officers informed the court of "the underlying circumstances from which the informant concluded that narcotics were where he claimed they were, and some of the underlying circumstances which the officer concluded that the informant was credible or his information was reliable." *Aguilar vs. Texas*, 378 U.S. 108, 114, 12 L.Ed.2d 723, 729, 84 S.Ct. 741. The Court in McCray goes on to say at 386 U.S. 311, 18 L.Ed.2d 71: "As we said in United States v. Ventresca, 380 U.S. 102, 108, 13 L.Ed.2d 684, 688, 85 S.Ct. 741, we have recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed . . .' was 'credible or his information reliable'." *Aguilar v. Texas*, supra.

In the case sub judice, agent Buchanan did not give any testimony as to the underlying circumstances from

which the informant concluded that narcotics were where he or she claimed, namely the trailer park. The agent also did not testify in any detail as to that the informant was credible and his information reliable. The agent did not know if the information from the informant resulted in 10 or 50 arrests. When defense counsel sought to question the agent as to these "underlying circumstances", the prosecutor objected, and the court sustained his objection. Nothing in Agent Buchanan's testimony as to what he was told by the informant in any way related to your petitioner, or the fact that cars were going to be used to trans-ship the marijuana. The alleged statement of the undisclosed informant is the cornerstone of the State's claim of probable cause. The non-disclosure of the informant's identity results in unfairness to the petitioner, as demonstrated in the *Federal Rules of Evidence*, *34 L.Ed.2d cxxiii, Rule 510(3)*: "One of the acute conflicts between the interest of the public in nondisclosure and avoidance of unfairness to the accused as a result of nondisclosures arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search." *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), rehearing denied 386 U.S. 1042. A hearing in camera provides an accommodation of these conflicting interests. *U.S. v. Jackson*, 384 F.2d 825 (3d Cir. 1967). The limited disclosure of the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and decisions there discussed. Because of the failure of the testimony of the State's witnesses to meet the two-pronged "Aguilar" test as stated in McCray, supra,

this cause should be remanded to the trial court for an in camera hearing to resolve the question of the disclosure of the informant's identity.

Agent Buchanan's testimony fails to meet the 'guidelines' set out by the opinion of this Court in Aguilar, supra, and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). The mere fact that the search in question was without the benefit of a warrant, does not make this standard less stringent. This was made amply clear in *Whitley v. Warden of Wyoming Penitentiary*, 401 U.S. at 566, and 28 L.Ed.2d at 312, and *United States v. Ventresca*, 380 U.S. at 110-111, 12 L.Ed.2d 725, 726, and *Jones vs. United States*, 362 U.S. at 270, 271, 4 L.Ed.2d at 707, 708. Prior to Lt. Lees stopping the petitioner's vehicle, the only evidence of criminal activity at the trailer park, outside of the informant's statement to Agent Buchanan, is the statement of some unidentified agent at the trailer park, that marijuana is being loaded from the motor homes into three vehicles. The agents in the park, for some unexplained reason, did not testify at the motion to suppress. No underlying basis was stated on how they concluded that the bags being loaded from the motor homes into the trunks of the autos were marijuana. From the testimony of the petitioner, the bags were wrapped first in burlap and then in plastic garbage bags. It is clear from the testimony that the agents and Lt. Lees assumed that the bags being loaded from the motor homes into the trunk of the petitioner's vehicle was marijuana. This court has never allowed such assumptions and suspicions to be elevated to the level of "Probable Cause." Spinelli vs. U.S., supra, at 393 U.S. 418, 21 L.Ed.2d 645, states: "But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable

cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient."

The facts of the case sub judice are strikingly similar to *Henry v. United States*, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959). The Court states at 361 U.S. 103, and 4 L.Ed.2d 134: "The prosecution conceded below and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view of the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered, is not enough. An arrest is not justified by what the subsequent search discloses, as Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367, supra, holds." *** On the record, there was far from enough evidence against him to justify a magistrate in issuing a warrant. So far as the record shows, petitioner had not even been suspected of criminal activity prior to this time. Riding in a car, stopping in an alley, picking up packages, driving away — these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively. *** What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses, under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.

The fact that the suspects were in an automobile is not enough. *Carroll v. United States*, supra, liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.

Lt. Lees intended to stop the car containing the petitioner at the time the vehicle left the trailer park. Therefore, probable cause must be determined at the time the vehicle is stopped, not subsequent to the arrest of the petitioner. The state may not benefit from the fruits of an illegal search and seizure. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d, 441, 83 S.Ct. 407 (1963).

II

EVEN ASSUMING THAT THE ARRESTING OFFICER HAD PROBABLE CAUSE TO STOP THE PETITIONER'S VEHICLE, THE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE FAILURE OF THE ARRESTING OFFICER TO OBTAIN A SEARCH WARRANT PRIOR TO SEARCHING AND SEIZING THE EVIDENCE FROM THE TRUNK OF THE PETITIONER'S VEHICLE.

This court has long held in decisions interpreting the Fourth Amendment that with a few narrow exceptions, that searches and seizures without a search warrant, were not justified by the searching officer's knowledge of information which may amount to probable cause. The war-

rant requirement is basic to the protection of the right of privacy, the burden is on those seeking the exception, to show the need for it. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). The petitioner was arrested for drunkenness and the driver was arrested for an "illegal left turn and driving under the influence of something." The arresting officer admitted that he intended to stop the vehicle at the time it left the trailer park. At the time the vehicle was searched, the petitioner and his companion were not in their vehicle, but were handcuffed, and under guard in the police cruiser. Lt. Lees testified that he searched the trunk in order to inventory the contents of the trunk. He admits on cross examination, that this "inventory" was not to protect the property of the petitioner or his companion, but was for the purpose of discovery of evidence of a crime, namely possession of marijuana.

The cases relating to the exceptions to the warrant requirement of the Fourth Amendment, as handed down by this Court, have been close decisions, which have been narrowly drawn to the facts in each case. There is a danger that the so-called "auto exception" to the warrant requirement, may become the rule.

As this court stated in *Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973), Note 2 at 37 L.Ed.2d 601:

> "Neither Carrol, supra, nor other cases in this court require or suggest that in every conceivable circumstance the search of an automobile even with probable cause may be made without the

extra protection for privacy that a warrant affords." *Chambers v. Maroney*, 399 U.S. at 50, 26 L.Ed.2d 419. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 458-464, 29 L.Ed.2d 564, 91 S.Ct. 2022."

As stated in *Coolidge v. New Hampshire*, supra, at 403 U.S. 461, 29 L.Ed.2d 580:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' Carroll, supra, at 153, 39 L.Ed. 790, and the 'automobile exception,' despite its label, is simply irrelevant."

It is obvious that the "exigent circumstances" this court found to exist in *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). The petitioner's companion had not tried to flee from the officer when notified to stop; at the time Lt. Lees searched the trunk of the petitioner's vehicle, the officer stated that he was in no danger; another police unit was present on the scene; the petitioner and his companion were safely handcuffed and locked in

the police cruiser. The automobile exception is simply irrelevant to the present fact situation. The fact the officer did conduct the search of the highway clearly demonstrates the lack of exigent circumstances.

It is clear from *Preston v. United States*, 376 U.S. 364, 368, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964), that a search of the accused and things under his immediate control may be made contemporaneous with the arrest, in order to prevent the accused from seizing a weapon or destroying evidence of the crime for which he is being arrested. Once the accused is under arrest and in custody, then a search made at another place, without warrant, is simply not incident to the arrest. At the time of the arrest in the case sub judice, the petitioner was not in the Dodge, but had been previously searched and handcuffed and locked in a police cruiser, under additional police guard. At that point there was no danger that they could have used any weapons in their vehicle, or could have destroyed any evidence of the crime of "making an illegal left turn, driving under the influence of something, or drunkenness." In Preston, supra, the petitioners were arrested for "vagrancy". In both cases, it was obvious that the charges lodged were mere subterfuges to conduct an exploratory search for incriminating evidence of a crime other than the one for which the parties were arrested. In Preston, this Court held that the search of the petitioner's vehicle was not incident to a lawful arrest, and was unreasonable for lack of a valid search warrant. The search in the present case should have been declared to be unreasonable by the trial judge, as not incident to a valid arrest.

In *Cady v. Dombroski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2535 (1973), this court found the warrantless

search of the trunk of a disabled vehicle belonging to a police officer to be reasonable, because the search of the trunk was to retrieve a revolver which to protect the public from the possibility that the revolver would fall into untrained or malicious hands. The officer were not searching for incriminating evidence, and at the time did not know that the crime in question had taken place. Such are not the facts before the Court.

Officer Lees' attempts to bring his search under the inventory exception, as expounded by this court in *Harris v. United States*, at 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968). In Harris, the police came across incriminating evidence which was in plain view, while they were making efforts to protect the petitioner's property. Justice Douglas in his concurring opinion assumed that *Preston v. United States*, supra, survived the Court's opinion because the car was lawfully in police custody, and the police were responsible for protecting the car; and while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, they came across incriminating evidence. Such are not the facts in the case sub judice. Lt. Lees admits that he was not trying to protect the parked car, but was searching for incriminating evidence of a crime other than what the petitioner was arrested for. It is obvious that the driver and the petitioner were arrested so that the car could be inventoried. This incident graphically illustrates how the so-called "auto" or "Carrol" exception is becoming the rule rather than the exception. Such police practices are common and wide-spread throughout the country.

Cardwell v. Lewis, 41 L.Ed.2d 325 (1974), is not applicable to the present fact situation, because the evidence

seized from the petitioner's vehicle was not in "plain view", and there is no doubt that there was a search and seizure of incriminating evidence from the trunk of the petitioner's rented car. There has, therefore, been an invasion of the petitioner's right of privacy as protected by the Fourth and Fourteenth Amendments to the United States Constitution. Such invasion was without probable cause; without a search warrant; and did not come under any of the narrow exceptions to the warrant requirements of said amendments.

CONCLUSION

It is respectfully submitted that the matters here presented deal with basic and fundamental constitutional rights arising under the Fourth Amendment to the United States Constitution. This petition deals with a question of Federal law which has not been, but should be, clearly settled by this Honorable Court.

Respectfully submitted,

ROBERT C. STONE &
SHELDON SCHAPIRO
Attorneys for the Petitioner

BY: /s/ Robert C. Stone
ROBERT C. STONE

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

TUESDAY, JUNE 4, 1974

CASE NO. 45,209
DISTRICT COURT OF APPEAL,
FOURTH DISTRICT
73-512

JOHN E. DUNBAR, III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ERVIN, BOYD, McCAIN and DEKLE, JJ., concur

SMB

CC: Honorable Emmett J. Comiskey,
Clerk
(with copies for the Trial Judge
& Clerk)

Honorable Andrew I. Friedrich
Honorable Stanley L. Seligman
Honorable C. Marie Bernard
Honorable George Georgieff

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: KAY D. GENT
Deputy Clerk

APPENDIX B

[TITLE OMITTED]

On consideration of the Petition for Rehearing filed by attorneys for the petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ADKINS, C.J., ERVIN, BOYD, McCAIN and DEKLE, JJ., concur

mr

cc: Hon. Emmett J. Comiskey, Clerk
Hon. John B. Dunkle, Clerk
Trial Judge

Bailey and Friedrich
Hon. Stanley L. Seligman
Hon. C. Marie Bernard
Hon. George Georgieff

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ Bernice L. Saunders
Chief Deputy Clerk

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1974

CASE NO. 73-512

JOHN E. DUNBAR, III,

Appellant

v.

STATE OF FLORIDA,

Appellee.

MARCH 5, 1974.

ORDERED that appellant's Petition for Rehearing, filed February 1, 1974, is hereby denied.

A TRUE COPY

/s/ Emmett J. Comiskey

EMMETT J. COMISKEY
CLERK

cc: Bailey & Friedrich
Stanley L. Seligman, Esq.
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